

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the matter of:	)	
	)	
Telepak Networks, Inc. d/b/a C Spire Fiber	)	
	)	MB Docket No. 19-159
v.	)	CSR-8978-C
	)	
Gray Television Group, Inc.	)	
	)	

**REPLY COMMENTS**

Telepak Networks, Inc. d/b/a C Spire Fiber (“C Spire”) hereby submits these reply comments in response to comments filed regarding the Public Notice (“Notice”) issued by the Commission in the above-referenced docket.<sup>1</sup> Specifically, C Spire responds to the comments filed by the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates (collectively, the “Affiliates”).<sup>2</sup>

As an initial matter, the Affiliates appear to support C Spire’s request that the Commission declare that “[w]hen the Commission modifies a commercial television broadcast station’s market to include an additional community or additional communities, that station and all of its broadcast streams are now considered to be in-DMA (or ‘local’) for reciprocal

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<sup>1</sup> *Telepak Networks, Inc. d/b/a C Spire Fiber, Retransmission Consent Complaint and Petition for Declaratory Ruling*, Retransmission Consent Complaint and Petition for Declaratory Ruling, MB Docket No. 19-159 (filed June 3, 2019) (“Petition”). Along with the Petition for Declaratory Ruling, C Spire concurrently filed a Retransmission Consent Complaint against Gray Television, Inc.

<sup>2</sup> *Telepak Networks, Inc. d/b/a C Spire Fiber, Retransmission Consent Complaint and Petition for Declaratory Ruling*, Joint Comments of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBS Television Affiliates Association, and NBC Television Affiliates on the C Spire Petition for Declaratory Ruling, MB Docket No. 19-159 (filed July 22, 2019) (“Affiliates Associations Comments”).

retransmission consent purposes in those communities.”<sup>3</sup> In their Comments, the Affiliates argue that reciprocal good faith bargaining already applies in market modification communities, and that the Commission need not take any action on C Spire’s Petition.<sup>4</sup> The Affiliates further maintain that a market modification does not remove a community from the market (assumedly, the DMA) that it already exists in, and that in no case is an MVPD or station required to enter into a retransmission consent agreement. In doing so, the Affiliates attempt to claim that Congress’s actions in 2014 did not intend to alter this balance. Yet, the Affiliates admit that Congress, in addition to adding a statutory factor to the market modification process – whether modifying the market of the television station would promote consumers’ access to television broadcast station signals that originate in their State of residence – also “prohibited stations from conditioning a grant of retransmission consent to an MVPD on that MVPD’s agreement not to carry other non-commonly-owned stations in the market modification areas.”<sup>5</sup>

This is precisely why C Spire has requested Commission action. As C Spire outlined in its Petition, Congress in 2014 was concerned that broadcasters could use retransmission consent agreements to limit the ability of an MVPD to carry broadcast television signals deemed local by the Commission through the market modification process.<sup>6</sup> It is implausible that Congress, with this concern in mind, would restrict a station from granting consent on an agreement not to carry

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<sup>3</sup> Petition at 19. Affiliates Associations Comments at 5-8.

<sup>4</sup> Affiliates Associations Comments at 5-8.

<sup>5</sup> *Id.* at 8 (emphasis added). STELAR amended Section 325 of the Communications Act to “prohibit a television broadcast station from limiting the ability of [an MVPD] to carry into the local market . . . of such station a television signal that has been deemed significantly viewed . . . or any other television broadcast signal such distributor is authorized to carry under section 338, 339, 340, or 534 of this title . . . .” *Satellite Television Extension and Localism Act Reauthorization Act of 2014*, Pub. L. 113-200, 128 Stat. 2059, 2062 (2014).

<sup>6</sup> Petition at 15-16.

another non-commonly-owned station in a market modification area while concurrently permitting a station to condition a grant of retransmission consent of the local station in that same market modification area on an MVPD carrying another non-commonly-owned station. The Commission seemingly agrees, stating in 2015 that the “very purpose of [the in-state market modification] provision of the STELAR is to provide consumers with access to news, politics, sports, emergency and other programming specifically related to their home state.”<sup>7</sup> And although the Commission was focused on the new satellite market modification process being implemented, it emphasized that “we expect broadcasters and satellite carriers alike will make the needs and expectations of orphan county consumers the priority in negotiating retransmission consent following a successful modification petition. We will monitor this situation closely and will take further action if such monitoring indicates that the purpose of this provision is not being effectuated.”<sup>8</sup> To Congress, the Commission and apparently the Affiliates, there should be no uncertainty here – a broadcast station cannot condition a grant of retransmission consent of a local station in a market modification area on an MVPD either carrying or not carrying a non-commonly owned station.

Beyond this initial matter, and despite substantial evidence to the contrary, the Affiliates also claim that there is no reason for the Commission to revisit its 2005 conclusion that the good faith rules were not intended to restrict territorial limitations in network affiliation agreements.<sup>9</sup> The Commission must reject this argument because it ignores the steps that Congress and the

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<sup>7</sup> *Amendment to the Commission’s Rules Concerning Market Modification, Implementation of Section 102 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd 10406, ¶ 28 (2015).

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> Affiliates Associations Comments at 9-11. Moreover, the Affiliates contend, without any substantiation, that eliminating territorial restrictions on the distribution of network programming would undermine localism and encourage MVPDs to challenge all other contractual restrictions contained in network-affiliate agreements. *Id.* at 11-15.

Commission have since taken to benefit communities and their citizens in misaligned market boundaries. The Affiliates contend that a station's local market for retransmission consent negotiation purposes under the Commission's rules is separate from its economic market – its DMA – identified by Nielsen.<sup>10</sup> In other words, the Affiliates argue that the decisions by Nielsen, a private company, should preempt the will of Congress and the Commission. This blatantly ignores that Congress, in enacting must carry, made clear that in certain circumstances, a DMA may not reflect a particular station's actual market of interest to viewers,<sup>11</sup> and provided that the Commission may “include additional communities within [a station's] television market or exclude communities from such station's television market.”<sup>12</sup> It is incorrect, therefore, to claim that a local television market for retransmission consent purposes is different and distinct from a station's economic market when market modification “provides a means for the Commission to modify the local television market of a commercial television broadcast station and thereby avoid rigid adherence to DMAs.”<sup>13</sup> If adopted by the Commission, the Affiliates' contention would nullify the Commission's ability to effectuate market modifications and the protections Congress has added to ensure access to in-state programming.

Moreover, while the Commission in 2005 noted that its good faith rules were not intended to restrict territorial limitations in network affiliation agreements, it has since twice

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<sup>10</sup> *Id.* at 10.

<sup>11</sup> See *House Committee on Energy and Commerce, Cable Television Consumer Protection and Competition Act of 1992*, H.R. Rep. No. 102-628, at 97 (1992).

<sup>12</sup> *Telepak Networks, Inc. d/b/a C Spire Fiber, Retransmission Consent Complaint and Petition for Declaratory Ruling*, Reply to Opposition, MB Docket No. 19-159, at 3-4 (filed July 3, 2019), *citing* 47 U.S.C. § 534(h)(1)(C)(i).

<sup>13</sup> See, e.g., *Harrison County, Texas, Petition for Modification of the Satellite Television Markets of KLTV, Tyler, Texas and KFXK-TV, Longview Texas*, Memorandum Opinion and Order, 33 FCC Rcd 5272, ¶ 4 (2018) (emphasis added).

requested comment on whether “certain network involvement in retransmission consent negotiations [should] be a factor suggesting bad faith” under its retransmission consent good faith negotiation rules.<sup>14</sup> The Commission has undertaken these examinations due, in part, to changes in the broadcast landscape. In 2005, networks had not yet begun increasingly interfering with the rights of MVPDs to carry distant signals and had not yet imposed blanket prohibitions on out-of-market broadcasters from entering into retransmission consent agreements where such carriage otherwise would be permitted. The digital transition was also in its infancy and multicast programming streams did not yet contain “must-have” big-four network programming.<sup>15</sup> Not until 2010 did the Commission examine whether it should regulate dual affiliations via multicast, including dual affiliation with more than one “big four” network. Later, in 2016 the Commission sought comment on “whether there have been any developments . . . that should cause us to reevaluate [declining to regulate dual affiliations via multicast].”<sup>16</sup>

Today, geographic restrictions in network affiliation agreements and dual big four affiliations via multicast programming streams, in addition to consolidation among affiliates, are distorting the marketplace and undermining well-established policies set by Congress and the

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<sup>14</sup> *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327, ¶ 14 (2015); *see also Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, ¶ 22 (2011) (“[W]e seek comment on whether it should be a *per se* violation for a station to agree to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision.”).

<sup>15</sup> *See, e.g., General Motors Corporation and Hughes Electronics Corporation, Transferors and the News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 202 (2004) (agreeing with commenters that carriage of local television broadcast station signals is critical to MVPD offerings).

<sup>16</sup> *See 2014 Quadrennial Regulatory Review F Review of the Commission’s Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Second Report and Order, 31 FCC Rcd 9864, ¶ 61 (2016).

Commission to preserve localism and ensure access to in-state programming. Contrary to the Affiliates' presumption, it is well-settled that the Commission may revisit and address – and even reverse – prior administrative decisions.<sup>17</sup> It follows, then, that due to the changes in the broadcast landscape, a provision in a network affiliation agreement that conditions the ability of a broadcast station to grant consent to an MVPD to retransmit a station's broadcast stream that has been found to be local pursuant to a market modification on the carriage of an additional non-commonly owned station should now violate the Commission's good faith rules.

In summary, the Commission must reject the arguments put forth by the Affiliates in their Comments and unquestionably declare that a station's market adjusted pursuant to a market modification petition receives the same local status as a station deemed local by Nielsen.

Respectfully submitted,



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<sup>17</sup> See, e.g., *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018) (reversing 2015 Order reclassifying broadcast Internet access service as a telecommunications service).